83-1160

NO. _____

Office - Supreme Court, U.S.
FILED
JAN 13 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HINSON McAULIFFE, Individually;
JAMES L. WEBB, as Solicitor General for the
County of Fulton, State of Georgia,
Petitioners,

v.

PENTHOUSE INTERNATIONAL, LTD.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GEORGE M. WEAVER
Assistant Attorney General
Counsel of Record for Petitioners

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
First Assistant Attorney General

DARYL A. ROBINSON
Senior Assistant Attorney General

Please serve:

GEORGE M. WEAVER
132 State Judicial Bldg.
40 Capitol Square
Atlanta, Georgia 30334
(404) 656-2976

QUESTIONS PRESENTED

1.

Whether a federal district court may properly decide the obscenity *vel non* under state law of a sexually explicit motion picture which is not protected speech as a matter of federal constitutional law.

2.

Whether, assuming a federal district court has jurisdiction to determine obscenity under state law, such a court may properly apply a reasonable doubt standard of proof where state civil remedies are available which would not require proof beyond a reasonable doubt and when this Court has specifically ruled that the reasonable doubt standard is not required in such proceedings.

3.

Whether, assuming jurisdiction to determine obscenity under state law, the prurient interest test of obscenity requires that sexually explicit material appeal to or sexually stimulate—as opposed to offend and repulse—the average person.

4.

Whether, assuming jurisdiction to determine obscenity under state law, the serious value test of obscenity was properly construed and applied in this case.

5.

Whether costs may be cast against a state prosecutor in his individual capacity when, acting in good faith and with probable cause, he declares his intention to enforce a valid state criminal statute.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	10
I. THE DISTRICT COURT'S EXERCISE OF SUBJECT MATTER JURISDICTION RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT AND, MOREOVER, THE ACCEPTANCE OF JURISDICTION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT	10, 11
II. THE DISTRICT COURT'S USE OF THE REASONABLE DOUBT STANDARD OF PROOF, ALTHOUGH STATE REMEDIES WERE AVAILABLE WHICH DID NOT REQUIRE PROOF BEYOND A REASONABLE DOUBT, CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT	16
III. THE DECISION BELOW THAT THE PRURIENT INTEREST TEST IS NOT MET WHEN SEXUALLY EXPLICIT MATERIALS ARE REPULSIVE AND OFFENSIVE CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT	18

TABLE OF CONTENTS (Continued)

Page

IV. THE DISTRICT COURT'S CONSTRUCTION AND APPLICATION OF THE SERIOUS VALUE TEST OF OBSCENITY CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT 23

V. THE DISTRICT COURT'S IMPOSITION OF COSTS AGAINST PETITIONER McAULIFFE IN HIS INDIVIDUAL CAPACITY RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT 28

CONCLUSION 29

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

Cases:

Allen v. McCurry, 449 U.S. 90 (1980) 11

California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theatre, 454 U.S. 90 (1981) 8, 17, 18

Ginzburg v. United States, 383 U.S. 463 (1966) 23

Grove Press Inc. v. Christenberry, 175 F.Supp. 488 (S.D.N.Y. 1959) 27

Jacobellis v. Ohio, 378 U.S. 184 (1963) 14, 26

Jenkins v. Georgia, 418 U.S. 153 (1974) 10, 14, 26, 27

Kois v. Wisconsin, 408 U.S. 229 (1972) 13, 20, 23

McKinney v. Alabama, 424 U.S. 669 (1976) 18

Memoirs v. Massachusetts, 383 U.S. 413 (1966) 20, 26

Miller v. California, 413 U.S. 15 (1973) 13, 14, 17, 19, 20

Mishkin v. New York, 383 U.S. 502 (1966) 20

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 16, 17, 21

Parratt v. Taylor, 451 U.S. 527 (1981) 11

Penthouse International, Ltd. v. McAuliffe, 601 F.2d 1353 (5th Cir. 1980) 27

People v. Mature Enterprises, Inc., 343 N.Y.S.2d 911 (1973) 27

Perez v. Ledesma, 401 U.S. 82 (1971) 12

Pinkus v. United States, 436 U.S. 293 (1978) 20

Roth v. United States, 354 U.S. 476 (1957) 20, 21

Smith v. United States, 431 U.S. 291 (1977) 14, 22, 28

TABLE OF AUTHORITIES (Continued)

Page

Cases: (Continued)

Sorrells v. United States, 287 U.S. 435 (1932) 21

Splawn v. California, 431 U.S. 595 (1977) 25

Spomer v. Littleton, 414 U.S. 514 (1974) 9

Steffel v. Thompson, 415 U.S. 452 (1974) 11, 12, 15

United States v. Levine, 83 F.2d 156 (2nd Cir. 1936) 27

United States v. One Book Called "Ulysses", 5 F.Supp. 182 (S.D.N.Y. 1933), 72 F.2d 705 (2nd Cir. 1934) 26, 27

United States v. Powers, 307 U.S. 214 (1939) 21

Wooley v. Maynard, 430 U.S. 705 (1977) 12, 15

Statutes:

O.C.G.A. § 16-12-80 .....*passim*

O.C.G.A. § 24-4-3 .....2, 5, 17

28 U.S.C. § 1254 2

28 U.S.C. § 1331 .....2, 5, 11

28 U.S.C. § 1343 .....2, 5, 11

28 U.S.C. § 2201 .....2, 5, 11

28 U.S.C. § 2202 .....2, 5

42 U.S.C. § 1983 .....2, 5, 11

TABLE OF AUTHORITIES (Continued)

Page

Other Authorities:

Gary Arnold, "All Rogues lead to Rome," *The Washington Post*, March 31, 1980, p. B1 3

"Caligula," *Penthouse*, May 1980 ..... 3, 4

F. Cohen, 14 Criminal Law Bulletin 225 22

H. P. Fahringer, Trial 33 (May 1978) 21

Fed. R. Civ. P. 39(c) 6

Fed. R. Civ. P. 43 9

Fed. R. Civ. P. 52 29

Fed. R. Evid. 803 27

Joseph Gelmis, Review of "Caligula," *Newsday*, February 2, 1980, p. 28/Part II 4

Stanley Kauffmann, Review of "Caligula," *The New Republic*, February 23, 1980, p. 24 4

Movie Ads, *Atlanta Constitution*, January 6, 1984, p. 6P 9

Oswyn Murray, Review of "Caligula," *Times Literary Supplement*, November 28, 1980, p. 1359a .. 5

Rex Reed, *New York Daily News*, February 6, 1980 .. 27

F. Schauer, The Law of Obscenity (1976) 15, 24, 26

Variety, December 28, 1983, p. 29 5

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HINSON McAULIFFE, Individually;
JAMES L. WEBB, as Solicitor General for the
County of Fulton, State of Georgia,
Petitioners,

v.

PENTHOUSE INTERNATIONAL, LTD.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Hinson McAuliffe and James L. Webb respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on October 17, 1983.

OPINIONS BELOW

The opinion of the equally-divided *en banc* Court of Appeals for the Eleventh Circuit, which according to that court affirms by operation of law the decision of the district court, is reported at 717 F.2d 517. The earlier panel decision of the Eleventh Circuit which reversed the

decision of the district court is reported, along with the subsequent order granting rehearing *en banc*, at 702 F.2d 925. The opinion of the District Court for the Northern District of Georgia is unpublished. Reproductions of all of these opinions appear in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on October 17, 1983. This petition for certiorari was filed within 90 days of that date. Note that this judgment was entered after the original panel decision, which was issued on April 11, 1983, was vacated by an order granting rehearing *en banc*. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the following statutes: 28 U.S.C. §§ 1331, 1343, 2201, 2202; 42 U.S.C. § 1983; O.C.G.A. §§ 16-12-80, 24-4-3. Pertinent parts of these statutes are reproduced in the appendix to this petition.

STATEMENT OF THE CASE

The motion picture "Caligula" is a sexually explicit motion picture which is owned by Penthouse International, Ltd. It is "hard-core pornography" as that expression has been used by this Court. The district court described the content of the film as follows:

> Opening with scenes suggesting Caligula's incestuous relationship with his sister, Drusilla, the film quickly progresses to the island grotto of the Roman Emperior [sic] Tiberius, Caligula's grandfather, where sexual acts and aberrations of all types are graphically depicted. From thence forward, the film is a dizzying display of bodies, genitals, orgies, heterosexual and homosexual activity, masturbation, bodily

> functions, and sexual conduct and excesses of all varieties.
>
> Sexual conduct is not all that is revealed, however. . . . From the assumption of power by Caligula to his final assassination by the Praetorian guards, the film is awash with blood and gore. . . . There are scenes of cruel and violent acts *ad nauseum*, including disembowelment, castration, decapitation, rape, and murder.

(R. 330). Calling the movie "appalling" and "repulsive," one movie critic described the movie as containing in addition to "hard-core sex": "disemboweling, beheading, castration, a gallery of naked freaks, torture, a little necrophilia, a little urolagnia, a vomiting scene in close-up *and* slow-motion, infanticide by head-bashing ad nauseum." [1] Respondent itself does not euphemize the content of the movie, but rather proclaims:

> Relishing the sensual pleasures of nymphs and satyrs alike, Caligula hosted riotous orgiastic feasts in his palace. Graphically depicted in the film, these scenes feature mountains of writhing bodies indulging in every conceivable sexual excess.[2]

Respondent describes another scene in the following terms: a "boy [is] disemboweled and castrated . . . his testicles [sent] to his widow as a token of his undying love . . . [and h]is penis . . . thrown to the dogs." In addition, Penthouse notes the suggestion of child pornography in this description of one scene: "The aged and ailing Tiberius fondles his slave children in the privacy of his

[1] Gary Arnold, "All Rogues lead to Rome,", *The Washington Post*, March 31, 1980, p. B1.

[2] "Caligula," *Penthouse*, May 1980, p. 81. According to its masthead, *Penthouse* is published by Penthouse International, Ltd. Note that the district court admitted excerpts from this same issue of *Penthouse* into evidence. (T. 762, 1401).

pleasure grotto."[3]

"Caligula" is perhaps the most expensive hard-core pornographic movie ever made. According to Penthouse International, Ltd., the movie which was filmed in Italy took four years and $17,500,000 to make. In fact, according to Bob Guccione, the owner of Penthouse International, Ltd., and the editor of *Penthouse* magazine, the final cost was around $22,000,000.[4] Guccione also said, "[T]his film deviates in so many ways from every other film ever made." [5] Several film critics have also noted the unusual aspects of this film. In the words of one:

> With its $17 million budget, it is believed to be the most lavish pornographic movie ever made. It's the first hard core pornographic movie on record that features legitimate performers. . . .[6]

It should also be noted that the well-known entertainment figures who were involved in the production of "Caligula" have disavowed the film. (R. 331).[7]

It is also noteworthy that this expensive sexually explicit movie has been widely distributed. According to trial testimony, "Caligula" has been exhibited in numerous foreign countries and, in its first eleven months of

---

[3] *Id.*, at 82. Of course under the "taken as a whole" elements of the obscenity test, no part of the content of a work, including violence, may be disregarded.

[4] *Id.*, at 6, 114.

[5] *Id.*, at 116.

[6] A review of "Caligula" by Joseph Gelmis, *Newsday*, February 2, 1980, p. 28/Part II. Review of "Caligula" by Stanley Kauffmann, *The New Republic*, February 23, 1980, p. 24 ("To my knowledge *Caligula* is the first fiction film in general release that contains many, many scenes of sexual activity photographed explicitly. Every variety of activity.").

[7] *Penthouse*, May 1980, p. 113f.

release, grossed $9,256,924.50. (T. 725).[4] According to recent sources, it has now grossed $10,352,047.00.[5]

On December 17, 1980, Penthouse International, Ltd., filed a complaint against petitioner Hinson McAuliffe, the elected solicitor of Fulton County, Georgia. McAuliffe was named in both his individual and official capacities. The complaint was filed in the Atlanta Division of the United States District Court for the Northern District of Georgia. (R. 4). In its complaint, respondent asked for a declaratory judgment that the motion picture "Caligula" is not obscene within the meaning of O.C.G.A. § 16-12-80, formerly Ga. Code Ann. § 26-2101. Respondent also sought an injunction prohibiting petitioner McAuliffe from initiating or conducting any prosecution under O.C.G.A. § 16-12-80. Penthouse claimed jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, 2202; and 42 U.S.C. § 1983. Penthouse also alleged that in a pleading filed in a lawsuit is New York concerning the importation of "Caligula" McAuliffe stated that if the motion picture were distributed in Fulton County, Georgia a prosecution would be initiated. As a result, respondent alleged that it was unable to obtain exhibitors in Fulton County. In his answer, petitioner McAuliffe made what he considered a compulsory counterclaim for a declaratory judgment that "Caligula" is obscene. (R. 45).

McAuliffe filed a demand for jury trial. (R. 56). On March 31, 1981, the district court struck this demand, but ruled that it would impanel an advisory jury under

[4] Of course, the witness who testified to this did not know how many people had walked out of the movie before it was completed. According to one reviewer, about one-third of the audience walked out on what was probably a typical showing. Review of "Caligula" by Oswyn Murray, *Times Literary Supplement*, November 28, 1980, p. 1359a.

[5] *Variety*, December 28, 1983, p. 29.

Fed. R. Civ. P. 39(c). (R. 148). The trial began before an advisory jury on April 13, 1981 and was concluded on April 25, 1981.

At the trial, both petitioner and respondent introduced the testimony of numerous expert witnesses. They testified about all aspects of the three-part obscenity test. Most were university professors.

Much of the expert testimony concerned the issue of prurient appeal. As the district court noted, there was remarkable agreement between petitioners' and respondent's witnesses on this subject. They all testified that the average person would find the movie shocking, repulsive, and offensive. As discussed later in this brief, the district court held that in order to violate the prurient interest test a work had to arouse or stimulate the average person. Employing this erroneous interpretation of the test, the district court found that because the movie was repulsive and shocking it did not appeal to the prurient interest.

Since the district court found "Caligula" to be offensive to the average person under the pruriency test, it is not surprising that the court found the movie to violate the patent offensiveness or "hard-core" test. The court found that the film depicted in a patently offensive way at least some of the acts of sexual conduct specified in the Georgia obscenity statute. (R. 335).

The parties offered considerable evidence on the serious value test of obscenity. Because the court found the movie to lack serious literary and scientific value, there is no need to discuss the evidence on those points.

Considerable attention at trial was focused on the issue of serious artistic value. In the district court's view, the most important witnesses were Dr. Sklar for respondent

and Dr. Fletcher for petitioners. Dr. Sklar defined "serious artistic value" as follows:

> [It is] an effort to communicate an idea, a mood, or an emotion, or more likely a combination of ideas, moods, or emotions through the various elements of film . . . .

(T. 347). Dr. Fletcher, on the other hand, said that a film drama has "serious artistic value" when "it brings to our attention something we haven't realized before or it makes clearer for us something that had not been so clear before or it gives us a sensitivity to something we had not been sensitive [to] before . . . ." (T.1106-7). He also stated that to have serious artistic value a "work would have to manifest both unity and integrity with respect to advancing a theme." (T. 1109). The district court agreed with Dr. Fletcher that "Caligula" is a "resounding artistic failure." (T. 340). However, the court adopted Dr. Sklar's broad definition of "serious artistic value" and, on that basis, found the movie to possess such value. (T. 338-40).

Considerable evidence was also adduced on the related question of serious political value. The several experts who addressed this subject generally analyzed the movie with respect to the theme "power corrupts." They offered various opinions as to whether the movie contained such a theme and, assuming it did, whether the theme was seriously advanced or pursued. The district court found that because the movie contained "political, historical, and social themes and sub-themes" it had serious political value. The court did not discuss whether there was any serious intent to convey a political message or whether any serious political message was in fact communicated. (T. 341).

It should also be noted that the district court employed a reasonable doubt standard of proof. The question of what standard of proof should be applied was raised prior to trial (R. 230) and each party filed a brief in support of its position. (R. 167, 253). The district court rejected petitioners' position and ruled that unless it were established beyond a reasonable doubt that "Caligula" is obscene, Penthouse would prevail. The district court charged this standard to the advisory jury (T. 8, 1511), and of course applied it in its own decision. (R. 344 n.4). The petitioner objected to the charge. (T. 33, 1526). It should also be noted that the special verdict form submitted to the advisory jury expressly employed the reasonable doubt standard. (R. 299). The use of this standard is in direct conflict with *California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theatre*, 454 U.S. 90 (1981).

The district court found that "Caligula" is not obscene. The advisory jury returned a special verdict that the movie does not, beyond a reasonable doubt, appeal to the prurient interest although it does, beyond a reasonable doubt, violate the patent offensiveness and serious value prongs of the obscenity test found in O.C.G.A. § 16-12-80. (R. 299). The district court entered its final order on May 15, 1981. It found that, although "Caligula" violates the patent offensiveness prong of the obscenity test and lacks serious literary and scientific value, it is not obscene because there is reasonable doubt as to whether it appeals to the prurient interest and whether it lacks serious artistic and political value. (R. 327). Based on these findings the district court issued a declaratory judgment that "Caligula" is not obscene under O.C.G.A. § 16-12-80. The court assumed that its declaratory judgment would be obeyed and, therefore, denied Penthouse's claim for injunctive relief.

While the case was under submission to the Eleventh Circuit, petitioner McAuliffe retired from office and was replaced by petitioner James L. Webb. Under Fed. R. App. P. 43(c), Webb was automatically substituted for McAuliffe to the extent that McAuliffe was named in his official capacity as Solicitor General of the State Court of Fulton County. However, McAuliffe was also named in his individual capacity. Even though only injunctive and declaratory relief with respect to his acts as solicitor were sought, McAuliffe apparently continues as a party to this appeal in his individual capacity.[10] Note also that costs were cast against petitioner McAuliffe in both his official and individual capacities. (R. 342, 345).

On April 11, 1983, a panel of the Eleventh Circuit reversed the decision of the district court. In their original

[10] In some circumstances, a substitution of parties may render the action moot. In *Spomer v. Littleton*, 414 U.S. 514 (1974), this Court vacated and remanded an action against a State's Attorney in Illinois, who had been named in his individual and official capacities, but had been succeeded by a new State's Attorney prior to the Supreme Court's decision. The Court noted that although the State's Attorney was sued in his official capacity, there was "nothing in the record upon which we may firmly base a conclusion that a concrete controversy" existed between the plaintiffs and the new State's Attorney. Thus, the Court remanded for a determination of mootness and whether the plaintiffs desired and should be permitted to amend their complaints so as to claim relief against the new State's Attorney. *Id.*, at 520-2.

This case should not be remanded for a determination of mootness. Counsel is authorized to state that the position of the new Solicitor General is identical to that of his predecessor. In other words, James L. Webb would also undertake prosecution of any person or organization which attempted to exhibit "Caligula" in Fulton County. Thus, no purpose would be served by remanding this action. It should be noted that this issue was presented to the Eleventh Circuit but that court did not choose to remand for a determination of mootness. It should also be pointed out that at the time of the preparation of the instant petition, the uncut version of "Caligula" was being exhibited in Fulton County. *See* Movie Ads, *Atlanta Constitution*, January 6, 1984, p. 6P. The current Atlanta run of the motion picture has continued for several months.

brief in the Court of Appeals, petitioners raised, *inter alia*, the district court's striking of their demand for jury trial, the ruling that "Caligula" is not obscene (and all subsidiary questions like the standard of proof), and the casting of costs against petitioner McAuliffe in his individual capacity. The panel noted that in its complaint respondent claimed that "Caligula" was not obscene under a Georgia criminal statute as constitutionally applied. The panel held that the district court had subject matter jurisdiction only to decide whether the motion picture was protected as a matter of "federal constitutional law." 702 F.2d 928-9. In support of its disposition, the panel cited *Jenkins v. Georgia*, 418 U.S. 153 (1974), in which the Court held that another motion picture was protected "as a matter of constitutional law." *Id.*, at 161. The panel also determined that the district court should not have received evidence (other than the film) and attempted to decide factual issues. 702 F.2d 928-9. Based on these conclusions, the panel ordered the case remanded for a determination of whether the movie was protected as a matter of federal constitutional law.

The Eleventh Circuit granted respondent's petition for rehearing *en banc* and the parties rebriefed and reargued the case. Petitioners reasserted all of their original arguments and also argued that the panel's decision was sound and should be adopted by the full court. On October 17, 1983, the twelve-member court announced that it was equally divided on proper disposition. Therefore, according to the *en banc* court, the judgment of the district court was affirmed by operation of law, although the affirmance has no precedential value. 717 F.2d 517.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT'S EXERCISE OF

SUBJECT MATTER JURISDICTION RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT AND, MOREOVER, THE ACCEPTANCE OF JURISDICTION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

One who has been the object of genuine threats of state prosecution may at least in some circumstances seek a federal declaratory judgment that the state statute in question may not be constitutionally applied to his conduct. As the Court made clear in *Steffel v. Thompson*, 415 U.S. 452, 475 (1974), one may seek such relief even though the statute is facially constitutional and the requirements for injunctive relief are not met.

Although there is no question in the instant case but that respondent was the subject of a genuine threat of prosecution, *Steffel* does not support the exercise of jurisdiction here.[11] In that case, Mr. Steffel had been threatened with prosecution under the Georgia criminal trespass statute for distributing handbills against the Vietnam War at a shopping center in the Atlanta area. It was apparent from the stipulated facts that the petitioner had violated, and intended to continue violating, the terms of the trespass statute—i.e., his conduct met all elements of the statute. The issue presented to the federal court was whether, even though Mr. Steffel's conduct satisfied all of the elements, the statute could be

[11] Petitioners denied in their answer that the district court had jurisdiction under the Civil Rights Act, 28 U.S.C. § 1343, 42 U.S.C. § 1983. The Civil Rights Act was not intended to provide relief in the circumstances presented here where state procedures are readily available to resolve the dispute. *See Allen v. McCurry*, 449 U.S. 90 (1980); *Parratt v. Taylor*, 451 U.S. 527 (1981). Petitioners maintain that the district court's jurisdiction to decide the constitutional fact of obscenity arises only under 28 U.S.C. §§ 1331, 2201.

constitutionally applied to his speech activities. As the Eleventh Circuit panel below noted:

> *Steffel* would have been a much different case had it been disputed whether the plaintiffs would make a "knowing" entry upon the defendant's land within the meaning of the state trespass statute. Problems of federalism and case or controversy would have then arisen.

702 F.2d at 929. The Court itself pointed out in *Steffel* that if it were determined that the statute could not be constitutionally applied the result would be that the statute is "incapable of being constitutionally enforced to the *full extent of its purport.*" *Steffel, supra, quoting Perez v. Ledesma*, 401 U.S. 82, 125-6 (1971) (separate opinion of Brennan, J.) (emphasis added). The issue presented in *Steffel* then was not whether the petitioner's conduct satisfied the elements of the trespass statute but whether, even though Mr. Steffel's conduct clearly violated the statute, the statute could be "constitutionally applied to the full extent of its purport." *Id. See also Wooley v. Maynard*, 430 U.S. 705 (1977) (federal injunctive relief authorized against prosecution for conduct which, although it clearly violated a state statute, was nevertheless constitutionally protected).

The only issue which Penthouse presented to the district court here was whether the elements of the Georgia obscenity statute were satisfied by "Caligula." Unlike in *Steffel, supra*, and *Wooley, supra*, Penthouse did not claim or present any credible evidence that, for reasons outside of the question of satisfaction of the elements of the offense, no valid conviction could be obtained against the exhibition of "Caligula." The claim was not that the Georgia obscenity statute could not be applied "to the full extent of its purport," but rather that its purport or

elements were not met. As the Eleventh Circuit panel below pointed out, for the district court to attempt to decide factual issues of element satisfaction is "to countenance the bypass of the entire state criminal justice system so a federal court could determine the 'guilt or innocence,' under a valid state criminal statute, of one who proposes to exhibit 'Caligula.' " 702 F.2d at 928. The panel went on to say:

> Notions of comity and federalism preclude us from recognizing such a cause of action, especially in an area in which local community standards are so crucial.

Id. These comments by the panel demonstrate the extraordinary importance of this case to the survival and integrity of the state criminal justice systems.

Although there are factual issues involved in any determination of obscenity *vel non*, there are also legal elements. In the Court's watershed decision in *Miller v. California*, 413 U.S. 15, 24 (1973), the Court laid down the three part test of obscenity which contains the prurient appeal, patent offensiveness, and serious value elements. As the Court pointed out, these elements or guidelines are for the "trier of fact." Nevertheless, other decisions of the Court make plain that there are legal, non-factual issues implicit in any obscenity determination. Each of the three elements of obscenity are reviewable by appellate courts on an independent basis. In *Kois v. Wisconsin*, 408 U.S. 229 (1972), the Court in applying an earlier version of the obscenity test held that the "dominance" of the theme of allegedly obscene material is a "question of constitutional fact," requiring independent

review of the materials at issue while giving "due weight and respect" to conclusions of the trial court and lower appellate courts. *Id.*, at 232. Later, in *Jenkins*, *supra*, the Court reversed an obscenity conviction and noted:

> Even though questions of appeal to the "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is "patently offensive."

Id., at 160. The Court reached the following holding:

> We hold that the film ["Carnal Knowledge"] could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene.

Id., at 161. *See also Jacobellis v. Ohio*, 378 U.S. 184, 190 (1963) ("[T]his court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."). It is significant that in *Jenkins*, the Court reversed on the basis of the patent offensiveness, or hardcore, prong. The Court found that the required acts of sexual conduct were not present. The Court has also noted in other cases that this prong of the test establishes an easily reviewable constitutional minimum as to what may be found to be obscene as a matter of fact. *See Smith v. United States*, 431 U.S. 291, 301, 305 (1977). It is clear what when a court makes a determination under any of the three prongs as to whether material is protected as a matter of constitutional law it is not resolving the factual issues involved in obscenity determinations. In other words, the court is not deciding whether the materials are obscene, but whether the materials even create fac-

tual issues as to obscenity. The question is whether the materials may constitutionally be found to be obscene, not whether the materials actually—as a matter of fact—are obscene. *See* F. Schauer, The Law of Obscenity (1976), pp. 113-5, 147-53.

Petitioner submits that the test suggested by the Eleventh Circuit panel for deciding whether a plaintiff is entitled to a federal declaratory judgment against a threatened state obscenity prosecution is sound and should be adopted by this Court. The panel suggested that in such circumstances a plaintiff should not be entitled to federal declaratory judgment unless the determination of constitutional law referred to above establishes that his conduct could not be the subject of a valid conviction. This accords with *Steffel*, *supra*, and *Wooley*, *supra*, in which no factual issues regarding satisfaction of the elements of the statutes were presented. As the panel pointed out, a federal court should not be allowed to resolve factual issues involved in prospective violations of state obscenity or other criminal statutes.

For the above-described reasons, the courts below erred in allowing the extension of federal relief. The district court should have been allowed only to determine if "Caligula" was protected as a matter of constitutional law, not whether it was in fact obscene. For a federal court to resolve the factual issues implicit in a determination of guilt or innocence under a state criminal statute is a disturbing and dangerous precedent. It is a clear expansion of *Steffel*, *supra*, and threatens the very survival of state criminal justice systems. Under the example furnished by the record in this case, if one who is threatened with prosecution under a valid state criminal statute can beat the prosecutor to federal court and raise

some constitutional issue, the federal court may then receive evidence and resolve factual questions involved in the issue of guilt or innocence.

II. THE DISTRICT COURT'S USE OF THE REASONABLE DOUBT STANDARD OF PROOF, ALTHOUGH STATE REMEDIES WERE AVAILABLE WHICH DID NOT REQUIRE PROOF BEYOND A REASONABLE DOUBT, CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

As pointed out in the Statement of the Case, the district court employed a reasonable doubt standard of proof in the trial of this case. Even assuming that the court had jurisdiction to resolve factual questions, the use of this standard of proof was legal error. Note that the district court both charged this standard to the advisory jury and, employed it in its own opinion. (T. 8, 1511; R. 344 n.4).[12]

The State of Georgia provides a civil nuisance remedy against obscenity. As this Court noted in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973):

> Georgia case law permits a civil injunction of the

---

[12] In the Court of Appeals, respondent argued that the district court gave petitioners the benefit of a lesser standard of proof. Respondent argued that even if it was error to apply the reasonable doubt standard, the error was harmless because the district court's findings of fact were not limited to the reasonable doubt standard.

This argument is, to say the least, not convincing. That the district court stated that it found the movie not to be obscene, rather than that it found there was a reasonable doubt as to whether the movie is obscene, is of no significance. The court had made it clear that it was using a reasonable doubt standard. Moreover, findings under a reasonable doubt standard are usually stated in the manner in which the district court stated its findings. Note that even though the jury in the instant case was advised to apply a reasonable doubt standard and this standard was expressly stated in its special verdict, the district court said that "the jury found . . . that the movie,

> exhibition of obscene materials. [Cits. omitted]. While this procedure is civil in nature and does not directly involve the state criminal statute proscribing exhibition of obscene material, the Georgia case law permitting civil injunction does adopt the definition of "obscene materials" used by the criminal statute.

Id., at 54. In this civil proceeding a lesser standard of proof than reasonable doubt would have been used. *See* O.C.G.A. § 24-4-3.

By declaring "Caligula" not to be obscene, the district court effectively precluded the use of the Georgia civil nuisance remedy. The district court declared that the movie was not obscene under the definition of "obscene materials" set forth in *Miller*, *supra*, and O.C.G.A. § 16-12-80. The use of the civil nuisance remedy is precluded because, as the Court pointed out in the above quotation from *Paris Adult*, the same definition of "obscene materials" is employed in civil nuisance actions.

After the trial of the instant case, this Court ruled in another case that the United States Constitution does not require that obscenity be proven beyond a reasonable doubt in a civil case. In *California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theatre*, 454 U.S. 90 (1981), a public

---

taken as a whole, does not appeal to the prurient interest." (R. 331). This shorthand rendition of the jury's finding accords with common usage, as for example when we say that the jury in a criminal case found the defendant not guilty instead of found that there was a reasonable doubt as to whether he was guilty. In addition, it should be noted that the district court expressly relied on the jury's finding that there was a reasonable doubt as to whether "Caligula" satisfied the prurient interest test. (R. 331-2). Indeed, that is the whole purpose of an advisory jury. Note that the dissenting judge on the panel below said that because the district court charged the advisory jury to apply a reasonable doubt standard, "[i]t is reasonable to assume that the trial judge applied th[is] standard [. . .] in his own fact findings." 702 F.2d at 930. Thus, it is clear that the district court's decision is inextricably wed to the reasonable doubt standard.

nuisance action against the exhibition of allegedly obscene motion pictures, the Court held:

> [T]he Court has never required the "beyond a reasonable doubt" standard to be applied in a civil case. . . .
>
> Thus while a State may require proof beyond reasonable doubt in an obscenity case, that choice is solely a matter of state law. The First and Fourteenth Amendments do not require such a standard.

Id., at 93-94. A majority of the Court rejected the position of Justice Brennan, expressed in *McKinney v. Alabama*, 424 U.S. 669, 683-4 (1976) (Brennan, J., concurring), that obscenity must be proven even in a civil proceeding beyond a reasonable doubt. The district court in the instant case expressly relied upon this concurring opinion in reaching its decision to apply the reasonable doubt standard. (R. 344 n.4). At a minimum reversal on the basis of *Mitchell Brothers'* is mandated here.

Therefore, the courts below have decided an important federal question in a way which conflicts with applicable decisions of this Court. Certainly, if obscenity laws are to have any weight and effect they must be applied correctly. In this of all cases the laws should be applied correctly because, as pointed out in the Statement of the Case, "Caligula" is perhaps the boldest pornography ever dumped into American society.

III. THE DECISION BELOW THAT THE PRURIENT INTEREST TEST IS NOT MET WHEN SEXUALLY EXPLICIT MATERIALS ARE REPULSIVE AND OFFENSIVE CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

In order to be obscene, material must be such that " 'the average person, applying contemporary communi-

ty standards' would find that the work, taken as a whole, appeals to the prurient interest." *Miller, supra*, at 24. This prurient appeal requirement is, of course, restated in the Georgia obscenity statute. O.C.G.A. § 16-12-80 (b)(1).

The district court below interpreted the prurient interest test to require that "Caligula" must "sexually stimulate" or arouse "erotic interest," in the average person (R. 332-4). The district court instructed the advisory jury as follows:

> Thus, if there exists a reasonable doubt as to whether or not the movie "Caligula" *predominately appeals to the prurient interest of the average person*, applying contemporary community standards, you should reflect that fact in your answer contained in the special verdict. . . . you are to consider the *appeal of this material to the average person*, the person with average sexual instincts, in determining whether or not this material appeals predominately to the prurient interest or is patently offensive.
> (emphasis added)

(T. 1514, 1516). Petitioner objected to this charge both before and after it was given (T. 1378-97, 1526) and even filed a post-trial brief on the issue. (R. 300). Citing the agreement among the expert witnesses that "Caligula" would repulse and offend the average person, the district court held that the movie did not satisfy the prurient interest requirement. The court found: "*Caligula* . . . does not . . . appeal to a prurient interest in sex. The tendency of Caligula instead is to inhibit sexual stimulation." (R. 335). It is also significant that the district court expressed confusion about the meaning of the prurient interest test. The court said: "The concept of prurient appeal has never been adequately defined by the Supreme Court." *Id.*

This Court's past decisions demonstrate that the prurient appeal test does not require that material appeal to or stimulate the average person. Rather, the Court's decisions show that the test requires that the average person would conclude, if he viewed the material, that it appeals to a prurient sort of interest. Under the Georgia law, this would mean that the average person must conclude that the material appeals to "a shameful or morbid interest in nudity, sex, or excretion." O.C.G.A. § 16-12-80(b)(1). In none of the Court's obscenity decisions has it stated the prurient interest test in such a fashion so as to require that material appeal to or stimulate the average person. *Roth v. United States*, 354 U.S. 476, 489 (1957) ("whether to the average person . . . the material . . . appeals to prurient interest"); *Kois, supra*, at 232 ("whether or not the 'dominant' theme of the material appeals to prurient interest"); *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966) (whether "the dominant theme of the material . . . appeals to a prurient interest in sex"); *Miller, supra*, at 24 ("whether 'the average person . . .' would find that the work . . . appeals to the prurient interest").[13] The sum of these decisions is that material does not have to appeal to or stimulate the average person in order to be obscene but must be such that the average person would find it to be an appeal to a prurient sort of interest.

In *Mishkin v. New York*, 383 U.S. 502 (1966), the Court rejected an interpretation of the pruriency test to the effect that materials which do not "stimulat[e]" the

[13] Note that in *Pinkus v. United States*, 436 U.S. 293, 301-2 (1978), the trial court gave an instruction which used the language "prurient interest of the average person." The case before the Court was an appeal by a criminal defendant. The propriety of this charge was not an issue before this Court.

average person but "disgust and sicken" him cannot be obscene. *Id.*, at 508. Although that case unlike the instant one involved materials "designed for and primarily disseminated to a clearly defined deviant sexual group" ("Caligula" has been distributed to the public at large), the same principle applies here. Hard-core pornography cannot be allowed to excape regulation simply because it is so bad that it is offensive and repulsive to the average person.

Other considerations also support petitioners' position. Well known rules of statutory construction require that statutes be interpreted so as to give their provisions meaningful effect and not in a manner which would lead to absurd or unreasonable consequences. *United States v. Powers*, 307 U.S. 214, 217 (1939); *Sorrells v. United States*, 287 U.S. 435, 447 (1932). To interpret the pruriency test to require that material arouse or appeal to the average person frustrates legislative intent and renders the law meaningless by permitting material that is most violative of community standards to go unregulated. If material is so far beyond community standards that it offends and repulses the average person then, under the district court's interpretation, it cannot be obscene. Obviously this vitiates the purpose of obscenity laws to prevent the infringement of community standards by explicit materials. *See, Roth, supra*, at 487 n.20; *Paris Adult, supra*, at 57-8.[14]

[14] It is significant that a leading obscenity defense lawyer has explained how the interpretation of the pruriency test taken by the district court can be used to defend the most abhorrent material. He has said: "(A)n argument can be made by the defense that it would not appeal to the average person's or juror's" sexual desires. Consequently, an acquittal is mandated. . . ." H. P. Fahringer, Trial 33 (May 1978). An account of how Fahringer used this tactic, with a trial court's help, to frustrate the New York obscenity law and obtain findings of non-obscenity on graphic homosexual and bestiality

The district court's interpretation of the pruriency test also makes nonsense of the obscenity law by producing contradictions in the very definition of "obscene materials." *First*, as mentioned above it produces a contradiction between the community standards and the prurient appeal elements involved in the pruriency test. As long as material is so violative of community standards that it disgusts or repulses the average person, it is not obscene under the district court's formulation. *Second*, a contradiction is generated between the prurient appeal and patent offensiveness prongs of the test. Under the patent offensiveness requirement, the material must, applying contemporary community standards, be patently offensive to the average person. *Smith*, *supra*, at 300-1. But at the same time, under the district court's interpretation, the material must appeal to or stimulate the average person. This obviously makes nonsense of the law.

For the above-stated reasons it is clear that the courts below have decided an important question of federal law in a way in conflict with the applicable decisions of this Court. Obviously, this question is important because if obscenity laws are to have any meaning and effect they must be interpreted in a manner consistent with this Court's prior decisions and with reason. The importance of a correct interpretation of the prurient interest test is

---

movies is found in another article. F. Cohen, 14 Criminal Law Bulletin 225. Fahringer admitted that the movies were awful and that even he had difficulty looking at them, but argued that they did not arouse the average person and thus did not appeal to prurient interest. The court charged a definition of "prurient appeal" which coincided with the defense argument. *Id.*, at 230. The jury was forced to acquit the defendants because, as one juror said afterwards, the movies did not appeal to the interest of ordinary adults. *Id.*, at 231.

again highlighted in this case by the brazenness of this hard-core pornographic movie.

IV. THE DISTRICT COURT'S CONSTRUCTION AND APPLICATION OF THE SERIOUS VALUE TEST OF OBSCENITY CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The district court interpreted and applied the serious value test in such a manner as to make the test meaningless and of no effect. As pointed out in petitioners' Statement of the Case, the district court defined "serious artistic value" as "an attempt to communicate ideas, moods, and emotion through the different elements of film." And, the court found "Caligula" to have serious political value because it "contains political, historical, and social themes and subthemes." (R. 338-43). Obviously, this approach by the district court fails to impose any meaningful restraint on sexually explicit materials. Even the most abhorrent and outrageous pornography could easily be found to be "an attempt to communicate ideas, moods, and emotion" and to contain "political, historical, and social themes and subthemes." The ideas, themes, etc., could themselves be pornographic. The district court's approach fails to guard against obscene materials which contain apparently serious elements inserted only as a sham. *See Kois, supra*, at 231 ("A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication. . . ."); *Ginzburg v. United States*, 383 U.S. 463 (1966).

A proper view of serious value—including of course serious artistic and political value—must accommodate two factors. One is the sort of effort or purpose that the material represents. Is it an attempt to make a serious

product? The other factor is whether the material effectively carries out its purpose, whether it communicates its message. The assessment of serious value is generally made with respect to the theme(s) or apparent theme(s) of a work. Schauer, *supra*, at 147. It is appropriate to keep in mind that almost all witnesses in the instant case analyzed "Caligula" with respect to the theme "power corrupts."

Consider the question of serious intent or purpose. Schauer says that the purpose behind the material is important. He says, "The value to be serious, must be in a significant amount. It must also represent a major purpose of the material . . . . [A]n analysis of the relationship of the serious matter to the sexually explicit matter . . . will inevitably involve a determination of intent as well as effect." *Id.*, at 147; *see also* 288. Even though the district court gave particular weight to the testimony of Dr. Sklar who defined "serious artistic value" totally in terms of the intent or purpose of the material (T. 352), the district court apparently did not understand this test. Whenever petitioners sought to inquire about the intent or purpose of the makers of "Caligula" the district court stopped them. (e.g., T. 376-81, 450). The district court even prevented them from arguing this point to the advisory jury. (T. 1466-7). Moreover, the district court excluded evidence offered by petitioners that tended to show that "Caligula" is a commercial exploitation of erotica solely for the sake of its prurient appeal. (T. 1140). The evidence consisted of promotion or advertising of the movie by Penthouse. While excluding petitioners' evidence of advertising, the district court admitted other evidence on the same subject when offered by respondent. (T. 727). Clearly, the District Court should have considered petitioners' evidence of adver-

tising because this Court has held that such evidence is significant to the serious value issue. *Splawn v. California*, 431 U.S. 595, 598-9 (1977); O.C.G.A. § 16-12-80(d). On the question of serious political value, the district court's treatment of the evidence on the historical accuracy of the film showed its failure to understand the importance of intent or purpose. Respondent claimed in its complaint (R. 3) and throughout the case that the movie was historically accurate. It justified the explicit sex and violence by saying that it was merely a faithful rendition of historical fact. (T. 453f.). But, respondent's witness on historical accuracy, Dr. Thomas Africa, admitted that the movie omitted most of the political events of "Caligula's reign and, moreover, that it contained much sex and violence for which there was no historical evidence. Dr. Thomas Burns of Emory University testified for petitioners in the same manner. He asserted emphatically that the movie was not historically accurate, was a total distortion of Roman history, and in no measure faithfully represented political events in the reign of "Caligula." (T. 831f.). Although the district court is correct in saying that historical accuracy is neither a necessary nor a sufficient condition for serious political value, the evidence on this question was extremely important because it related to whether the film is a serious effort to communicate a political message. If the movie is a gross distortion of Roman history surfeited with a welter of gratuitous sex and violence—as the evidence on balance demonstrated—it is not a serious effort. In summary, a proper understanding of the question of serious intent or purpose reveals that the district court erred in finding that "Caligula" has serious artistic and political value.

The effect of the movie is also important to serious

value. *See* Schauer, *supra*, at 147. And, it is significant that the advisory jury found the movie to lack serious artistic or political value. (R. 299, 299A). The jury was especially qualified to measure the effect, or success in communicating, of the film. Yet its findings were ignored. Several witnesses on artistic value stated that the success of the movie in communicating or presenting its theme was crucial to serious artistic value. For example, Drs. Cripps, for respondent (T. 435f.), and Fletcher, for petitioners (T. 1106f.), generally testified that the success of a film in presenting its message is the way in which serious artistic value *vel non* is gauged, although Cripps found "Caligula" to have serious artistic value while Fletcher did not. The district court apparently agreed with Dr. Fletcher inasmuch as it held the movie to be a "resounding artistic failure." (R. 340). But, of course, the district court did not agree that the effect of a movie is important to serious artistic value. Perhaps the most probative evidence of serious artistic value *vel non* is the critical acclaim (or lack thereof) a work receives. Petitioners offered in evidence some sixteen published critical reviews of "Caligula." Although Penthouse agreed that critical acclaim is important to serious value (R. 186) and the State filed an extensive brief in support of their admissibility (R. 192), the district court excluded them. (T. 1349). Pretrial notice of intention to offer hearsay was given by petitioners (T. 118, 155) and numerous precedents allowing such evidence were cited. For example, in the following cases critical acclaim was considered in regard to the obscenity *vel non* of various works: *Jenkins*, *supra*, at 158-9 (reviews of movie "Carnal Knowledge"); *Memoirs*, *supra*, at 447 n.2, 3, (1966) (Clark, J., *dissenting*) (reviews of book *Fanny Hill*); *Jacobellis*, *supra*, at 196 (reviews of French movie "Les Amants"); *United States v.*

One Book Called "Ulysses", 5 F.Supp. 182, 183 (S.D.N.Y. 1933), 72 F.2d 705, 706 (2nd Cir. 1934), (reputation and reviews of book *Ulysses*); *United States v. Levine*, 83 F.2d 156, 158 (2nd Cir. 1936) (L. Hand, J.) (reviews of several books); *Grove Press Inc. v. Christenberry*, 175 F.Supp. 488, 497-9 (S.D.N.Y. 1959) (reviews and reputation of book *Lady Chatterley's Lover*); *People v. Mature Enterprises, Inc.*, 343 N.Y.S.2d 911, 912-4, 917, 920-1 (1973) (reviews of movie "Deep Throat"); *Penthouse International, Ltd. v. McAuliffe*, 601 F.2d 1353, 1372 (5th Cir. 1980) (reputation of and awards received by *Penthouse* magazine). In most of these cases critical reception or reputation was adduced in support of a finding or opinion of non-obscenity but in several, e.g., *People v. Mature Enterprises*, *supra*, it was used to support a finding or opinion of obscenity. As petitioners argued below these reviews were admissible either as ordinary evidence, *United States v. Levine*, *supra*, especially in view of compliance with Fed. R. Evid. 803(24), or as judicially noticed legislative fact. *See Jenkins*, *supra*. The reviews are certainly probative of serious value—especially serious effect. Their almost unanimous condemnation and scathing tone demonstrate that "Caligula" has not had a serious effect.[15]

The effect or success of "Caligula" in respect to serious political value is a related question. As Dr. Reo Christenson, an eminent political scientist testified, "Caligula" does not communicate any serious political information. He said:

"I think that it also does not have serious political

[15] A typical review called the movie "a $17 million trough of rotten swill" and "abominable." The same review went on to say, "Movies . . . can't sink any lower than *Caligula*." Rex Reed, " 'Caligula,' the first 5-ychhh film," *New York Daily News*, February 6, 1980.

> value, because the movie itself is so full of scenes of sexual orgies and sexual debauchery, and so full of very vivid scenes of violence that the people who see the film are going to leave the film with those images in their minds. They are not going to leave with some kind of political message in their minds.

(T. 920). Thus, "Caligula" also fails to communicate any serious political message. This Court's independent review of serious value, *see Smith*, *supra*, at 305, will secure this point.

In summary, it is apparent with regard to serious artistic and political value that "Caligula" both lacks any serious purpose or intent and fails to have any serious effect. A correct application of the serious value test would have yielded these conclusions. For the same reasons mentioned earlier, the district court's failure properly to construe and apply the serious value test is a decision of an important federal question which deserves review. The district court's decision leaves obscenity laws impotent and of no meaning.

V. THE DISTRICT COURT'S IMPOSITION OF COSTS AGAINST PETITIONER McAULIFFE IN HIS INDIVIDUAL CAPACITY RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT.

The district court entered judgment and assessed costs against Petitioner McAuliffe both as Solicitor General of Fulton County and in his individual capacity. (R. 342, 345). Even if the district court's ruling is correct on the merits, to cast costs against petitioner McAuliffe in his individual capacity was legal error. According to all of the evidence, petitioner acted only in his official capacity. (T. 657). Moreover, as the Eleventh Circuit panel below

noted, McAuliffe unquestionably acted in good faith and with probable cause in stating that he would undertake prosecution of any persons who exhibited "Caligula" in his jurisdiction. 702 F.2d at 927-8.[16]

This is also an important federal question. To allow costs in these circumstances against a public official in his individual capacity is a frightening precedent. It can only chill and discourage the performance of governmental duties.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Eleventh Circuit.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

MARION O. GORDON
First Assistant Attorney General

DARYL A. ROBINSON
Senior Assistant Attorney General

GEORGE M. WEAVER
Assistant Attorney General

Please serve:

GEORGE M. WEAVER
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-2976

[16] Inasmuch as the trial was by a court sitting without a jury, no objection to this ruling need have been made below. Fed. R. Civ. P. 52.

APPENDIX

APPENDIX

PENTHOUSE INTERNATIONAL, LTD.,
Plaintiff-Appellee,

v.

Hinson McAULIFFE, Individually and as Solicitor General for the County of Fulton, State of Georgia, Defendant-Appellant.

No. 81-7426.

United States Court of Appeals,
Eleventh Circuit.

Oct. 17, 1983.

Appeal from the United States District Court for the Northern District of Georgia; Richard C. Freeman, Judge.

Before GODBOLD, Chief Judge, and RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

The court voted to consider this case en banc, which resulted in the panel opinion's being vacated. The judges of the en banc court, having heard oral argument and considered the case, are equally divided on the proper disposition. The judgment of the district court, 702 F.2d 925, is therefore AFFIRMED by operation of law, and this decision by the court of appeals has no precedential value. *Henderson v. Fort Worth Independent School District*, 584 F.2d 115 (5th Cir.1978) (en banc), *cert. denied* 441 U.S. 906, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979).

AFFIRMED BY OPERATION OF LAW.

PENTHOUSE INTERNATIONAL, LTD.,
Plaintiff-Appellee,

v.

Hinson McAULIFFE, Individually and as Solicitor General for the County of Fulton, State of Georgia, Defendant-Appellant.

No. 81-7426.

United States Court of Appeals,
Eleventh Circuit.

April 11, 1983.

Owner of rights to film brought suit to enjoin county prosecutor in Georgia from prosecuting or threatening to prosecute, under Georgia obscenity statute, any person exhibiting the film. The United States District Court for the Northern District of Georgia at Atlanta, Richard C. Freeman, J., denied permanent injunction but granted declaratory relief in favor of the plaintiff. On appeal by the county prosecutor, the Court of Appeals, Tjoflat, Circuit Judge, held that: (1) injunctive relief was properly denied where reasonable prosecutor could believe there was probable cause that those who would be involved in exhibition of the film would violate the Georgia obscenity statute as constitutionally applied, but (2) district court erred in proceeding to determination of the obscenity vel non of the film where such issue could not be resolved as matter of law.

Affirmed in part; reversed in part and remanded.

Lynne, District Judge, sitting by designation, dissented and filed opinion.

1. Injunction 105(1)

Where prosecutor threatened to enforce valid criminal statute against behavior that fell within ambit of statute, in that reasonable prosecutor could have believed there was probable cause that those who would be involved in exhibition of film would violate Georgia obscenity statute as constitutionally applied, such prosecutorial threat under such circumstances gave rise to no cause of action for injunction. O.C.G.A. § 16-12-80; U.S.C.A. Const.Amend. 1.

2. Constitutional Law 90.1(8)

Obscenity is not protected under the First Amendment, and states are free to enact statutes making exhibition of obscene matter criminal. O.C.G.A. § 16-12-80; U.S.C.A. Const.Amend. 1.

3. Criminal Law 31

It is fundamental that some innocent persons may be charged with violating criminal statutes, and, absent prosecutorial misconduct, no constitutional claim exists to relieve burden on those innocent persons of defending valid criminal prosecutions.

4. District and Prosecuting Attorneys 8

Prosecutor was well within his discretion in threatening to prosecute persons associated with showing of film, in that reasonable prosecutor could have believed there was probable cause that those involved in exhibition of such film would be violating Georgia obscenity statute as constitutionally applied. O.C.G.A. § 16-12-80; U.S.C.A. Const.Amend. 1.

5. Courts 508(7)

Though county prosecutor threatened to enforce valid criminal statute against behavior falling within ambit of statute, in sense that reasonable prosecutor could have believed there was probable cause that those who would be involved in exhibition of film would violate Georgia obscenity statute as constitutionally applied, owner of rights to film was not entitled to ruling from federal district court that film was not obscene unless it was proved that film was not obscene as matter of law regardless of factual context in which movie was shown. O.C.G.A. §§ 16-12-80, 16-12-80(b); U.S.C.A. Const.Amend. 1.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT and HENDERSON, Circuit Judges, and LYNNE*, District Judge.

TJOFLAT, Circuit Judge:

Penthouse brought this suit to enjoin the Solicitor General of Fulton County, Georgia, Hinson McAuliffe, from prosecuting or threatening to prosecute under the Georgia obscenity statute, Ga.Code § 16-12-80 (1980), any person who exhibited the movie "Caligula," the rights to which Penthouse owns.[1] Penthouse also sought a declaration that "Caligula" is not obscene within the meaning of that obscenity statute as constitutionally ap-

---

*Honorable Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama sitting by designation.

[1] Jurisdiction was predicated on 28 U.S.C. § 1343(3) (1976 & Supp. IV 1980), through which 42 U.S.C. § 1983 (1976) is implemented.

plied.[2] After a trial before the district court and an advisory jury, the court declared "Caligula" not obscene under state or federal law. The court denied Penthouse's prayer for a permanent injunction because it assumed that a declaratory judgment would have the same practical effect as an injunction of restraining prosecution or threats thereof. McAuliffe appeals from the district court's entry of declaratory relief in favor of Penthouse.

We affirm the district court's denial of the injunction, although our reasoning differs from that of the district court.[3] We reverse the district court's grant of Penthouse's prayer for declaratory relief and remand this claim because the court erred in proceeding to a determination of the obscenity vel non of "Caligula."

The essence of Penthouse's complaint is that McAuliffe is infringing on Penthouse's first amendment rights by threatening to prosecute persons involved in the showing

---

[2] Penthouse makes no attack on the facial validity of the Georgia obscenity statute. Indeed, such an attack would be frivolous because that statute explicitly incorporates the constitutional standards enunciated in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Ga.Code § 16-12-80 (1980).

[3] We recognize that Penthouse never cross-appealed the district court's denial of injunctive relief. Therefore, we discuss such denial at the risk of pontificating obiter dictum. We believe our discussion is necessary, however, for two reasons. First, our discussion of the district court's grant of declaratory relief would not be complete without a discussion of its denial of injunctive relief. Although the two prayers for relief are separate, they are closely related. A typical complaint, such as the one Penthouse brings, would contain both prayers. Neither should be considered in a vacuum; profitable comparison results from a discussion of both. Second, the district court denied injunctive relief solely because it thought declaratory relief would be sufficient. We now reverse the district court's grant of declaratory relief. Our reasons for agreeing with the district court that it should not have granted injunctive relief are so different from that of the lower court that we believe we are compelled to state them.

of "Caligula." [4] Penthouse alleges that it cannot obtain an exhibitor in Fulton County because of McAuliffe's threats of prosecution.[5] To remedy this infringement, Penthouse seeks two remedies: an injunction against prosecution or threats thereof, and a declaration that "Caligula" is not obscene. Careful analysis reveals that these two remedies are in fact based on separate causes of action.

[4] Penthouse's complaint describes the threat as follows:

Defendant McAuliffe's Conduct

16.

Defendant McAuliffe has publicly announced that he considers *Caligula* to be obscene by commencing a lawsuit in United States District Court for the Southern District of New York in the name and style: *Morality In Media, Inc., individually; and Morton A. Hill, S.J., for himself and all others similiarly* [sic] *situated; and Hinson McAuliffe, in his official capacity as Solicitor General of Fulton County, Georgia, himself and all others similiarly* [sic] *situated v. One Motion Picture Film Entitled "Caligula," a res; Edward R. Korman, in his official capacity as United States Attorney for the Eastern District of New York; and Benjamin R. Civiletti, in his official capacity as Attorney General of the United States*, Civil Action No. 80-0640 (hereinafter the "Southern District of New York Lawsuit"). Defendant McAuliffe, allegedly in his capacity as Solicitor General of Fulton County, Georgia, and as part of the Southern District of New York Lawsuit, caused to be issued by the Clerk of said court, a warrant for the seizure of *Caligula*.

17.

In the Southern District of New York Lawsuit initiated by Defendant McAuliffe and others, Defendant McAuliffe alleged under oath that *Caligula* is obscene; and Defendant McAuliffe alleged that if *Caligula* is exhibited in Fulton County, Georgia, Defendant McAuliffe will commit public funds and resources to institute prosecutions under Georgia law. Record, vol. 1, at 8-9. Penthouse's complaint also alleges that the plaintiffs in the Southern District of New York lawsuit, including McAuliffe, sought to compel the defendants therein to initiate some type of action to prevent the exhibition or distribution of "Caligula" in the United States. *Id.* at 9.

[5] We have no reason to question the district court's findings that McAuliffe has threatened to prosecute and that Penthouse cannot obtain an exhibitor in Fulton County.

[1] The focus of Penthouse's suit for an injunction is on McAuliffe's conduct. McAuliffe threatened to enforce a valid criminal statute against behavior that falls within the ambit of the statute, in the sense that a reasonable prosecutor could have believed there was probable cause that those who would be involved in the exhibition of "Caligula" would violate the Georgia obscenity statute as constitutionally applied. Prosecutorial threats in such circumstances give rise to no cause of action for an injunction.[6] To sustain a cause of action for an injunction, Penthouse would have to show some sort of "bad-faith" conduct on McAuliffe's part. We do not mean subjective bad-faith conduct; rather, if Penthouse could show that no probable cause reasonably could have existed to believe that those who would be involved in the exhibition of "Caligula" would be violating the Georgia obscenity statute as constitutionally applied, because "Caligula" is so clearly not obscene, the requisite objective bad faith would be shown.

[2, 3] We base this reasoning on several premises. Our initial and most basic premise is that obscenity is not pro-

[6] Indeed, the Supreme Court has, in dicta, addressed a similar, if not identical, situation. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). After holding an act creating a censorship commission unconstitutional, the Court stated:

> [W]e do not mean to suggest that private consultation between law enforcement officers and distributors prior to the institution of a judicial proceeding can never be constitutionally permissible. We do not hold that law enforcement officers must renounce all informal contacts with persons suspected of violating valid laws prohibiting obscenity. Where such consultation is genuinely undertaken with the purpose of aiding the distributor to comply with such laws and avoid prosecution under them, it need not retard the full enjoyment of First Amendment freedoms.

Id. at 71-72, 83 S.Ct. at 640. Thus, the Supreme Court has at least intimated that there may be no constitutional problem arising from threats of enforcement of a valid obscenity statute against conduct that falls within the reach of the statute.

tected under the first amendment. *See Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973). Thus, states such as Georgia are free to enact statutes making the exhibition of obscene matter criminal. *See* Ga.Code § 16-12-80 (1980). Our second premise is that states may enforce their valid criminal statutes within constitutional limits. They may also charge certain public officials, such as McAuliffe, with the responsibility of enforcing such laws. Our third premise is that it is fundamental that some innocent persons may be charged with violating criminal statutes, and that absent prosecutorial misconduct, no constitutional claim exists to relieve the burden on those innocent persons of defending valid criminal prosecutions. We believe the validity of these three premises is beyond question. We believe also that these premises lead inescapably to the conclusion that law enforcement officials must be allowed the discretion in good faith to do all that is reasonably necessary to their function of enforcing valid laws, and that the first amendment contemplates no other result.

[4] We hold that McAuliffe was well within his discretion in threatening to prosecute persons associated with the showing of "Caligula." Having viewed "Caligula," it is clear to us that a reasonable prosecutor could have believed there was probable cause that those who would be involved in the exhibition of "Caligula" in Fulton County, Georgia, would be violating the Georgia obscenity statute as constitutionally applied. Regardless of the obscenity vel non of the movie, it cannot be contended that the movie is so clearly not obscene that McAuliffe was acting in "bad faith" in threatening to prosecute. Without such a showing, we hold a claim for an injunction under the first amendment is not stated. Therefore, we affirm the district court's denial of Penthouse's prayer for injunctive relief.

[5] Penthouse's second claim seeks a declaratory judgment that "Caligula" is not obscene under the Georgia obscenity statute as constitutionally applied. We hold that Penthouse is entitled to this relief only if it can prove that "Caligula" is not obscene as a matter of law. If factual issues are present, Penthouse's claim must be denied because the claim would be nothing more than a request that a federal court determine whether prospective, possibly illegal conduct is in fact illegal under a valid state criminal statute. To allow such a claim would be to countenance the bypass of the entire state criminal justice system so a federal court could determine the "guilt or innocence," under a valid state criminal statute, of one who proposes to exhibit "Caligula." Notions of comity and federalism preclude us from recognizing such a cause of action, especially in an area in which local community standards are so crucial. *See Miller v. California*, 413 U.S. 15, 30-34, 96 S.Ct. 2607, 2618-20, 37 L.Ed.2d 419 (1973). In contrast, if Penthouse can prove that "Caligula" is not obscene as a matter of law, notions of comity and federalism would not interfere with a federal court's grant of declaratory relief. In granting relief, the federal court would not be invading the province of the state fact-finder; rather, it would be determining a question of federal constitutional law as a matter of law.

Furthermore, if Penthouse cannot prove that "Caligula" is not obscene as a matter of law, its claim must fail because it would not prove a present case or controversy. The allegedly protected conduct would be the prospective exhibition of a movie under hypothetical conditions. However, by addressing the claim only as a matter of law, no problem of the requisite case or controversy would exist because the complaint would be that the facts in-

volving the exhibition of the film, *e.g.*, where and when the movie is shown, are irrelevant. The complaint would be that regardless of the factual context in which the movie is shown, the movie is not obscene as a matter of law. Thus, there is nothing to prevent a federal court from recognizing such a cause of action.

We believe the above analysis is consistent with and supported by a case somewhat analagous to this one, *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). In *Steffel* the Supreme Court held that a valid claim for declaratory relief was stated when the complaint alleged threats of prosecution under a facially valid criminal prespass statute against conduct arguably protected under the first amendment. A cognizable claim was stated because a federal court could determine as a matter of law whether such threats violated the plaintiff's constitutional rights. No factual issues needed resolution; a pure question of law was presented. Because such a question was presented, no prohibitive problems of federalism or case or controversy arose.

Steffel would have been a much different case had it been disputed whether the plaintiffs would make a "knowing" entry upon the defendant's land within the meaning of the state trespass statute. Problems of federalism and case or controversy would have then arisen. The same problems arose in this case when the district court determined the obscenity vel non of "Caligula." The court had to determine the following hypothetical factual issues under the Georgia obscenity statute: whether the future showing of "Caligula" would predominantly appeal to the prurient interest of the local community; whether the showing would be patently offensive to that com-

munity; and whether the showing would have serious literary, artistic, political, or scientific value. *See* Ga.Code § 16-12-80(b) (1980). Only if these questions can be resolved as a matter of federal constitutional law [7] does this case parallel *Steffel*. If not, the district court must not attempt to resolve these questions because they are more appropriately left to state factfinders and because they involve hypothetical circumstances.[8]

AFFIRMED in part; REVERSED in part and REMANDED.

LYNNE, District Judge, dissenting:

In my opinion the discussion and affirmance of the district court's denial of an injunction are inappropriate. Penthouse did not contest that ruling by a cross-appeal. The superficial parallelism of the remedies of injunctive

[7] Because these questions must be resolved as a matter of law, a jury has no role in these determinations.

[8] We hold only that the district court cannot decide the question of the obscenity of "Caligula" as a matter of state law. We remand the case of the court to decide the question as a matter of federal constitutional law, just as a federal appellate court would if it was reviewing a state jury determination. *See Jenkins v. Georgia*, 418 U.S. 153, 161, 94 S.Ct. 2750, 2755, 41 L.Ed.2d 642 (1974) ("We hold that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene.") Thus, the dissent mischaracterizes our holding as one of abstention. We are not refusing to intervene to protect federal rights; we are refusing only to decide state law questions. We see no prohibition on deciding whether "Caligula" is protected as a matter of federal constitutional law without deciding any state law questions. The dissent also fails to recognize the separate nature of the state and federal questions. For example, the Georgia obscenity statute must give at least as much protection to "Caligula" as does the first amendment, but the statute may extend greater protection consistent with federal law. Furthermore, state law may vary depending on who applies it, i.e., a federal judge or a state jury. The state should be free to interpret its own law so long as that interpretation is consistent with federal constitutional law.

and declaratory relief would not seem to justify consideration of standards applicable to the former to illuminate the only issue before us, the grant of the latter.

I believe the court's opinion is contrary to the precise holding of *Steffel:*

> We therefore hold that, regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied. 415 U.S. 452, 475, 94 S.Ct. 1299, 1223-24, 39 L.Ed.2d 505 (1973).

It is conceded that Penthouse demonstrated a genuine threat of enforcement of the Georgia statute. Clearly there is a dispute as to whether this statute may be applied to "Caligula." McAuliffe believes "Caligula" is obscene; Penthouse does not. Thus there is a case or controversy within the meaning of Article III of the Constitution and the Federal Declaratory Judgment Act, 28 U.S.C. Sec. 2201. *Septum, Inc. v. Keller*, 614 F.2d 456 (5th Cir. 1980).

Synthesizing the averments of the complaint, the consolidated pre-trial order, the trial transcript, and the May 15, 1981 order of the court, it is at once apparent that the gravamen of the claim asserted by Penthouse is that "Caligula" is protected by the First Amendment as applied to the States through the Fourteenth Amendment. Concededly obscene material is not protected. *Miller* established a three-prong coterminous test to determine obscenity vel non which Georgia incorporated in its statute.

If "the average person, applying contemporary community standards would [not] find that ["Caligula"], taken as a whole, appeals to the prurient interest," the First Amendment insulates it from the application of the Georgia statute. Appeal to the prurient interest is a question of fact. *Smith v. United States*, 431 U.S. 291, 301, 97 S.Ct. 1756, 1763-64, 52 L.Ed.2d 324 (1977).

It would be anomalous to suggest that it is possible to adjudicate the question of whether material is obscene under the Georgia statute without resolving at the same time whether such material is protected by the First Amendment within the *Miller* definition of obscenity since out of the facts the law arises. Both the advisory jury and the court found as a fact that, applying contemporary community standards, Caligula does not appeal to the prurient interest.

A careful review of the Court's instructions to the jury reveals that its definition of the prurient interest was in accord with the teaching of *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). The Court properly charged the jury that the burden of proof with respect to obscenity was proof beyond a reasonable doubt. *McKinney v. Alabama*, 424 U.S. 669, 684, 96 S.Ct. 1189, 1197, 47 L.Ed.2d 387 (1976) (Brennan, J., concurring in the judgment). It is reasonable to assume that the trial judge applied these standards in his own fact findings.

Finally, I cannot agree with the implication of the Court's opinion that the district court was powerless to resolve the question of whether Caligula is obscene under the Georgia statute in order to reach the question as to whether it is protected by the First Amendment; that it is "more appropriately left to state factfinders."

Septum, Inc. squarely holds that under the circumstances of this case abstention is inappropriate. Presumably state factfinders would be confined to a criminal proceeding. The fallacy of this approach is demonstrated by the reasoning of *Steffel:*

> [W]hile a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state prosecution is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

415 U.S. at 462, 94 S.Ct. at 1217.

I respectfully dissent.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PENTHOUSE INTERNATIONAL, LTD. vs. HINSON McAULIFFE, Individually and as Solicitor General for the County of Fulton, State of Georgia	CIVIL ACTION NO. 80-2172A

ORDER

This action for declaratory and injunctive relief is brought under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution. Plaintiff, Penthouse International, Ltd. (Penthouse) is the owner of the film *Caligula* and the rights to distribute the film in the United States. Penthouse wishes to distribute *Caligula* for exhibition in Atlanta, Georgia. Defendant Hinson McAuliffe is the Solicitor General of Fulton County, which includes the city of Atlanta, and is authorized to enforce the Georgia criminal obscenity statute, Ga. Code § 26-2101. Penthouse seeks a declaratory judgment that *Caligula* is not obscene under Ga. Code § 26-2101 and the First Amenement, and an order enjoining defendant McAuliffe from arresting or prosecuting any persons connected with the film's distribution or exhibition. McAuliffe has asserted a counterclaim seeking a declaration that the film is obscene under state and federal standards.

We note at the outset that the issues raised in this action are properly before this court under the standards

set out in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. There is no state criminal or civil proceeding pending against plaintiff. *See Steffel v. Thompson*, 415 U.S. 452 (1974). In addition, plaintiff's standing has not been challenged. Solicitor McAuliffe made it abundantly clear both before Penthouse filed this action and at trial that he would attempt to institute criminal proceedings against plaintiff if it should undertake to distribute or exhibit *Caligula* in Fulton County, Georgia. A representative of a local theater also stated that he would exhibit the film but for fear of prosecution. The jurisdiction of this court is predicated on 28 U.S.C. §§ 1331, 1343.

The action came before the court for trial on April 13-22, 1981. To aid the court in its application of "contemporary community standards" as required by *Miller v. California*, 413 U.S. 15, 24 (1973), the court in its discretion impaneled an advisory jury at trial pursuant to Rule 39(c), Fed. R. Civ. P. The following order shall serve as the court's findings of fact and conclusions of law, Rule 52(a), Fed. R. Civ. P.

I. THE LEGAL STANDARDS

The Supreme Court established a three-pronged test in *Miller v. California* governing the determination of obscenity under either state or federal legislation. The factfinder must examine:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest. . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24. The Georgia criminal obscenity statute substantially tracks the constitutional test and defines with specificity the types of sexual conduct that may fall under the second criterion of the *Miller* formula.[1] Ga. Code § 26-2101.

---

[1] Ga. Code § 26-2101 provides:

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. Provided, however, the character and reputation of the individual charged with an offense under this law, and if a commercial dissemination of obscene material is involved, the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) to the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is a shameful or morbid interest in nudity, sex or excretion;

(2) the material taken as a whole, lacks serious literary, artistic, political or scientific value, and

(3) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (i) through (v) below:

(i) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(ii) Acts of masturbation;

(iii) acts involving excretory functions or lewd exhibition of the genitals;

(iv) acts of bestiality or the fondling of sex organs of animals;

(v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship;

The first and second prongs of the *Miller* guidelines require the factfinder to apply contemporary community standards to the factual determination of the work's "prurient appeal" and "patent offensiveness." *Smith v. United States*, 431 U.S. 291, 300-01 (1977). In addition, "obscenity is to be judged according to the average person in the community, rather than the most prudish or most tolerant." *Id.* at 304. The factfinder, whether judge or jury, may draw on its own knowledge of the community, aided by expert testimony in certain instances, when making its determinations.

On the other hand, the third prong of the test, whether the material "taken as a whole, lacks serious literary, artistic, political, or scientific value," *Miller v. California*, 413 U.S. at 24, is intended as a check on the first two elements of the test. *See Jenkins v. Georgia*, 418 U.S. 153, 164 (1974) (Brennan, Stewart, Marshall, JJ., concurring). The judicial role is more pronounced in the determination of the "serious value" of the material, which is not to be judged by the tastes of the "average person" or measured by "community standards." *See Smith v. United States*,

---

(c) Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section.

(d) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(e) It is an affirmative defense under this section that dissemination of the material was restricted to:

(1) a person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or

(2) a person whose receipt of such material was authorized in writing by a licensed medical practioner or psychiatrist.

A person convicted of distributing obscene material shall be punished as for a misdemeanor of a high and aggravated nature.

431 U.S. at 301. Each and every element of the *Miller* test must be met, however, before a work can be adjudicated obscene.

II. THE OBSCENITY VEL NON OF CALIGULA

Robert Guccione, editor of *Penthouse* magazine and president and chairman of Penthouse International, Ltd., the producer of *Caligula*, has allegedly recreated in the film the life of the Roman Emperor Caligula during his reign from 37 A.D. to 41 A.D. and the condition of Roman society at that period in history. Based on the biography of Caligula in *The Twelve Caesars* by the ancient historian Suetonius, the movie is purportedly adapted from a screenplay by Gore Vidal and stars Malcolm McDowell, Peter O'Toole, Sir John Gielgud, Teresa Anne Savoy, and Helen Mirren. To date, the film has been exhibited in over one hundred cities in the United States and in a number of foreign countries.

Mr. Guccione could have made an interesting movie of Caligula's life and times, but he chose not to. For approximately two and one-half hours, the movie depicts with vivid explicitness the decadence and corruption that characterized imperial Rome. Mr. Guccione leaves little to the viewer's imagination in the depictions of the sexual promiscuity and violence that allegedly abounded in the Emperor's household, court, and in Roman society at large. Opening with scenes suggesting Caligula's incestuous relationship with his sister, Drusilla, the film quickly progresses to the island grotto of the Roman Emperior Tiberius, Caligula's grandfather, where sexual acts and aberrations of all types are graphically depicted. From thence forward, the film is a dizzying display of bodies, genitals, orgies, heterosexual and homosexual activity, masturbation, bodily functions, and sexual con-

duct and excesses of all varieties.

Sexual conduct is not all that is revealed, however. Violence is as much a part of the corrupt Roman society portrayed in this film as is promiscuity.[2] From the assumption of power by Caligula to his final assassination by the Praetorian guards, the film is awash with blood and gore. As soon as Caligula takes the ring symbolizing imperial authority from the hand of the dying Tiberius, he is transformed into a brutal monster with a depraved indifference to human life. There are scenes of cruel and violent acts *ad nauseum*, including disembowelment, castration, decapitation, rape, and murder.

This cinematic portrayal of sex and violence, Penthouse asserts, has a serious, although not an original, message. Borrowing from Lord Acton, Penthouse contends that the film *Caligula* conveys the moral that "power corrupts and absolute power corrupts absolutely." Fearing perhaps that the viewer might miss this message in *Caligula* as originally filmed by Italian director Tinto Brass, Mr. Guccione allegedly took the finished film and spliced in several additional scenes of explicitly sexual acts. Whether due to Mr. Guccione's artistic tampering with the movie or due to some other displeasure with the final product, Gore Vidal, Malcolm McDowell, Peter O'Toole, Sir John Gielgud, and others involved in the production have purportedly disassociated themselves from the film.

---

[2] "Obscenity" which can be regulated by the states includes only sexual, not violent, material. *Miller v. California*, 413 U.S. at 24. "Material containing violence, brutality or cruelty cannot be considered obscene unless it also contains depictions or descriptions of of sexual conduct." *Sovereign News Co. v. Falke*, 448 F. Supp. 306, 394 (N.D. Ohio 1977), *remanded*, 610 F.2d 428 (6th Cir. 1979), *cert. denied*, 447 U.S. 923 (1980).

Solicitor McAuliffe is firmly convinced that *Caligula* meets all three prongs of the *Miller* test, and is obscene within the meaning of the Georgia criminal code. Even before he had seen the film, McAuliffe brought an unsuccessful lawsuit in the Southern District of New York seeking the confiscation of the film, which was imported from abroad. Solicitor McAuliffe has threatened to institute criminal proceedings against any exhibitor in Fulton County who attempts to show *Caligula*.

If bad taste could be adjudicated "obscene" under the First Amendment, the task for this court would be greatly simplified. Few chores more distasteful than being a captive audience for Mr. Guccione's products have been thrust upon this court.[3] But vulgarity and offensiveness alone are not sufficient grounds for censorship under the prevailing law of obscenity. After viewing the film and listening to almost two weeks of testimony, the advisory jury impaneled for these proceedings determined that the film *Caligula* is not obscene under Ga. Code § 26-2101 and the *Miller* guidelines.[4] Specifically, the jury found that the film meets the applicable standards of patent offensiveness and that it lacks serious literary, artistic, political, or scientific value, but that the movie, taken as a whole, does not appeal to the prurient interest. For the reasons that follow, this court also concludes that *Caligula* is not obscene under federal or state law.

---

[3] *See, e.g., Penthouse International, Ltd. v. McAuliffe*, 454 F. Supp. 289 (N.D. Ga. 1978) (Freeman, J.); *Penthouse International, Ltd. v. McAuliffe*, 436 F. Supp. 1241 (N.D. Ga. 1977) (Freeman, J.), *rev'd in part*, 610 F.2d 1353 (5th Cir. 1980).

[4] The jury was instructed to apply the "beyond a reasonable doubt" standard of proof. *See McKinney v. Alabama*, 424 U.S. 669, 684-87 (Brennan, J., concurring).

A. **Prurient Appeal**

As the Supreme Court has pointed out, "sex and obscenity are not synonymous." *Roth v. United States*, 354 U.S. 476, 487 (1957). "Obscene material is material which deals with sex in a manner appealing to the prurient interest." *Id.* In its traditional meaning, obscenity may include that which is " '[o]ffensive to the senses, or to taste or refinement, disgusting, repulsive, filthy, foul, abominable, loathsome.' " *Miller v. California*, 413 U.S. at 18 n.2. But such material is not obscene, however, and hence not subject to state regulation unless it deals with sex in a way which appeals to the prurient interest. Thus, the first component of the tripartite *Miller* test is "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest." *Id.* at 24.

Although the Supreme Court set forth several definitions of "prurient interest" in *Roth v. United States*, 354 U.S. at 487 n.20, which are incorporated in the *Miller* formula, it quoted with approval the language used in the draft of the A.L.I. Model Penal Code.

> A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . .

See Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353, 1363 (5th Cir.), *cert. dismissed*, 447 U.S. 931 (1980). To appeal to the "prurient interest," the material must have " 'a tendency to excite lustful thoughts,' " or sexually stimulate the view or reader. *Roth v. United States*, 354 U.S. at 487 n.20. As one leading commentator on the law of obscenity has stated, if the aim of the work "is to produce psychic or physical stimulation, on a less than

intellectual plane, and on a short-term basis, then the prurient interest aspect of the test for obscenity has been met." F. Schauer, *The Law of Obscenity* 102 (1976).

For the "prurient interest" test to be satisfied, the dominant theme of the material, taken as a whole, must appeal to the prurient interest.[5] Even if an individual scene or scenes may create some sort of immediate erotic stimulation in the viewer, that is insufficient to meet the test. The prurient appeal must be a predominant theme in the work. Just as "[a] quotation from Voltaire on the flyleaf of a book will not redeem an otherwise obscene publication . . . ," *Kois v. Wisconsin*, 408 U.S. 229, 232 (1972), isolated scenes of sexual conduct, even if prurient, will not necessarily satisfy the first prong of the *Miller* test. When considering the material as a whole, the factfinder must decide whether the average person, applying contemporary community standards, would conclude that the work predominantly appeals to the prurient interest, or to a shameful or morbid interest in sex.

It is not disputed that *Caligula* contains a sexual theme and continuous depictions of sexual conduct. But prurient appeal is not the equivalent of sexual explicitness. Dr. Downing Tait, Jr., a practicing psychiatrist in the local area with impressive academic credentials, testified for Penthouse on the issue of prurient interest. In his opinion, to the average person in Fulton County, the overwhelming depictions of violence, cruelty, and sexual explicitness in *Caligula* would not arouse erotic interest. The doctor testified that the natural rhythm of sexual

---

[5] In *Miller v. California*, 413 U.S. at 24, the Supreme Court does not specifically use the phrase "dominant theme" or "predominant appeal" as used in *Roth v. United States*, 354 U.S. at 487 n.20, but the "taken as a whole" language in *Miller* carries the same meaning. *See* Schauer at 105. *See also* Ga. Code § 26-2101(b)(1).

arousal is, in fact, obstructed by the fast-paced explicitly sexual depictions.

Similarly, Dr. Wardell B. Pomeroy, sex therapist and co-author of the Kinsey Reports among other accomplishments, also testified as to the prurient appeal of *Caligula*. In his view, the film does not predominantly appeal to the prurient interest because there is no erotic build up or crescendo. The doctor stated that he had seen films which appealed to the prurient interest in sex, but that *Caligula* did not. Although unfamiliar with Fulton County standards, Dr. Pomeroy testified that the average person would likely find the film revolting and offensive, but lacking in stimulative effect.

Dr. Fred Crawford, a professor of sociology at Emory University, and Dr. James Mallory, a psychiatrist practicing in Atlanta primarily in the area of family counseling and the applicability of Christian principles to mental health problems, testified for defendant McAuliffe on the issue of prurient appeal. Dr. Crawford stated that the average person in Fulton County would be shocked or repulsed by the film, which he believes appeals to a shameful or morbid interest in sex. Dr. Mallory also testified that the predominant appeal of the movie would shock or disgust most people in Fulton County, and therefore the average person would find that it appeals to a prurient interest in sex.

Neither of defendant's witnesses were particularly credible either on the issue of community standards or on the issue of prurient interest. Dr. Crawford is a sociologist with little expertise or experience in human sexuality.[6]

[6] Dr. Crawford has taken and taught courses on human sexuality public polling, and film. His doctoral dissertation was on the subject of the impact of tornado disasters on families.

Dr. Mallory's practice is also not focused on sexuality, and his contact with Fulton County residents is limited almost entirely to white clients seeking family counseling services, or those who attend his lectures to civic and church groups. In addition, Dr. Mallory and Dr. Crawford agreed with the plaintiff's witnesses that the effect of the film was shocking, not stimulating.

The concept of prurient appeal has never been adequately defined by the Supreme Court. It is clear from the cases, however, that the presence of shocking, disgusting, or explicitly sexual scenes in a movie is insufficient to satisfy the "prurient interest" test of *Miller*. Except for a prolonged and explicit lesbian love scene, and a protracted depiction of fellatio, the images of sexual conduct in *Caligula* are largely kaleidoscopic. While *Caligula*, taken as a whole, certainly does not appeal to a healthy or normal interest in sex, neither does it appeal to a prurient interest in sex. The tendency of *Caligula* instead is to inhibit sexual stimulation. This court finds, as did the advisory jury, that to the average person applying contemporary community standards, the film *Caligula*, viewed in its entirety, does not appeal to the prurient interest in sex.

B. **Patent Offensiveness**

Although *Caligula* does not contain explicit scenes of every act proscribed by the Georgia Code, it very nearly covers the gamut of prohibited depictions. That the depictions are also "patently offensive" and go "substantially beyond customary limits of candor," *Roth v. United States*, 354 U.S. at 487 n.20, is conceded by Penthouse. Except for some disputed evidence as to the proper definition of "sadomasochistic relationship," Penthouse made no attempt to convince the court or the jury that the film

either did not describe conduct enumerated in the Georgia law or that it did not depict the conduct in a patently offensive manner.

The jury representing the community's views in these proceedings determined that the sexual depictions in *Caligula* are an affront to contemporary community standards. In this court's view, the depictions of sexual conduct in *Caligula* exceed the customary limits of society's tolerance, and are "patently offensive" under state law and the second prong of the *Miller* test.

C. **Serious Value**

The third prong of the *Miller* test requires the fact-finder to determine "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24. Because the *Miller* test is conjunctive, and we have already determined that *Caligula* fails to satisfy the "prurient interest" element, we need not address the issue of serious value. Even if the film lacks serious literary, artistic, political or scientific value, it cannot be found obscene. Nevertheless, as there was considerable testimony on this issue at trial, we will briefly review our findings.

Penthouse contends that *Caligula* is, on the whole, a historically accurate portrayal of the depraved life and times of the Emperor Caligula, and that it conveys an important political message by showing the utter corruption that accompanies unbridled power. Penthouse also argues that the film contains serious artistic merit in its acting, cinematography, costuming and set design, use of music, and screenplay. Solicitor McAuliffe argues that the depiction of Caligula's life is merely a vehicle chosen by Penthouse for producing a hard-core pornographic film.

In *Miller v. California*, the Supreme Court expressly rejected the "utterly without redeeming social value" test

of *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), in favor of the "serious value" formulation. Unfortunately, there is little case law enlarging or defining the meaning of the phrase "serious value." It is clear, however, that "serious value" is not to be judged by the tastes of the "average person" or measured in terms of "community standards." *Miller v. California*, 413 U.S. at 30; *Smith v. United States*, 431 U.S. at 301. This court must rely on the opinions of expert witnesses as to the "serious value" of the specific material in question, while keeping in mind the Supreme Court's directive that "the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Miller v. California*, 413 U.S. at 23.

No doubt, there have been and will be viewers of the film *Caligula* who find it entertaining. The film also has a plot. It begins with Caligula's rise to power, progresses through his reign as Emperor, and ends with his well-deserved assassination. Further, the film conveys to the viewer at least one idea: Caligula and the Romans were depraved and decadent. None of these characteristics of *Caligula* would be enough, however, whether standing alone or taken together, to endow the film with "serious value." Mere entertainment value, the existence of a tenuous story or plot line, or the inclusion of an isolated idea are usually insufficient to redeem an otherwise obscene work. *See, e.g., Kaplan v. California*, 413 U.S. 115 (1973); *United States v. Gundlach*, 345 F. Supp. 709 (M.D. Pa. 1972); *United States v. New Orleans Book Mart, Inc.*, 328 F. Supp. 136 (E.D. La. 1971).

At the least, we believe that by the phrase "serious value" the Supreme Court meant to extend constitutional protection to material which advocates ideas and in which

the ideas are not used merely as a disguise or sham for presenting obscenity. The ideas must be a substantial part of the material and treated in a non-frivolous manner. *See* Schauer at 137-53. Serious themes inserted merely as a pretext to try to dignify or insulate obscene material will not entitle a film or any other work to constitutional protection.

In presenting its case, Penthouse neither claimed nor attempted to show that *Caligula* has serious scientific or literary value. Only one witness, Dr. Samuel Schoenbaum, a professor of Renaissance literature at the University of Maryland, peripherally touched on the literary merit of the screenplay. Plaintiff limited its evidence to testimony on the film's artistic and political value. Defendant offered several witnesses, however, who testified as to the lack of any serious scientific value in the film. This court cannot conclude from seeing the film and hearing the testimony presented that *Caligula* has serious scientific or literary value.

Caligula is, however, substantially more than a mere masquerade for pornography. Although the film falls far short of being a work of art or an important political statement, it does possess, in some significant amount, artistic matter and political themes. We do not believe that the "serious value" test of *Miller* was meant to extend constitutional protection only to works which are artistic successes or works which include textual political commentary. All political views and ideas, including historical narrative and social criticism, are protected, as are all serious artistic and intellectual efforts, whether they appeal to the average person or not. Weighing all of the factors evident in the film itself with the expert testimony presented at trial, we conclude that the film has

both serious artistic and political value.

One of the plaintiff's most convincing witnesses on the issue of artistic value was Dr. Robert Sklar, professor and chairman of the department of cinema studies at New York University, and author of many publications on film history, theory, and criticism. His definition of "serious artistic value" in regard to film is evidence of an attempt to communicate ideas, moods, and emotion through the different elements of film. Many films which are artistic failures and receive bad reviews nevertheless have serious artistic value. Although Dr. Sklar assessed *Caligula* as an artistic failure with many flaws, he found serious artistic value in the way the film communicated the themes of corruptive power, indifference to human life, terror, the relationship of mortality and immortality, and the apposition of genuine love versus depraved, abusive, and selfish gratification. Dr. Sklar testified that the movie conveyed these ideas and emotions through the effective use of acting, set design, cinematography, music, and the other elements of the cinematic art.

The defendant's witnesses on the issue of artistic value took a much more limited view of the meaning of that phrase. To Monsignor Clark, who is currently pastor of a church in Crestwood, New York, and was formerly a media liaison with the Catholic archdiocese of New York, "art" implies perfection in form, and a work has "serious artistic value" when there is something "beautiful" or "pleasing" about it. To Dr. James Fletcher, a teacher in journalism and mass communication at the University of Georgia, who has published in the area of mass communication, "serious artistic value" has a broader definition. A film drama, such as *Caligula*, has artistic value when it has "synthetic effect" and manifests "both unity and

integrity with respect to advancing a theme." In Dr. Fletcher's view, the execution of sets, costumes and make-up in *Caligula* are unartistic. The graphic portrayals of sex and violence detract from any artistic integrity and violate the principle of aesthetic distance by overinvolving the audience in physical details. In addition, Dr. Fletcher found that the movie does not have serious artistic value as a melodrama becuase the themes are not successfully carried out in the plot. Although Dr. Fletcher has taken several film courses, his expertise is in the area of audience response to mass media. He has never studied film aesthetics or criticism, and has not seen such major motion pictures as *The Deer Hunter*, *Cries and Whispers*, *Apocalypse Now*, *Klute*, *Coming Home*, *Shampoo*, or *Scenes from a Marriage*.

Although, in this court's view, the production of *Caligula* is a resounding artistic failure, we also find Professor Sklar's interpretation of artistic value particularly persuasive. "Serious artistic value" is an elusive concept and a difficult determination for a layperson, whether judge or jury, to make. Art is obviously more than what is pretty or pleasing to the eye, and it encompasses more than what is successful or popular. Evidence of originality or creativity is what distinguishes art from craft, and "serious artistic value" implies the presence of originality and artistic effort in some substantial amount. Although there are many offensive and unnecessary scenes in *Caligula* which detract from its artistic value, the artistic effort and creativity that went into the acting and the filming of the movie are evident. Taken as a whole, we conclude that *Caligula* has serious artistic value.

Both parties also called a parade of witnesses testifying to the political value, or lack thereof, of *Caligula*.

Assertedly based on Suetonius's biography of Caligula in *The Twelve Caesars*, Penthouse contends the film is an accurate historical depiction of the depravity of pagan Rome, and it teaches the lesson that absolute power corrupts absolutely. Mr. McAuliffe argues that the film is historically inaccurate and its political value trivial. Any political or historical message is lost in the images of sex and violence.

There was much testimony at trial on the issue of the historical accuracy and completeness of *Caligula*. While we are persuaded that, for the most part, the types of events and grotesque behavior portrayed in the film are historically factual, historical accuracies or discrepancies are largely irrelevant to whether the movie has serious political value.[7] Although historical accuracy may add

---

[7] By "political value," the Supreme Court did not mean to extend constitutional protection only to works which advocate political ideas or opinions, that is, to ideas relating strictly to government. Ideas relating to social issues and institutions are equally protected. *See, e.g., Kois v. Wisconsin*, 408 U.S. at 230:

> 'The freedom of speech and of the press guaranteed by the Constitutional embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the time. . . .*'

(emphasis in original), *quoting Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940). *See also Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 688-89 (1959):

> It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax.

to the purported political or educational value of a work, mere historical meticulousness will not rescue an otherwise obscene work from censorship. On the other hand, a purely fictional account may have political value if it advocates an idea or expresses an opinion. As the Supreme Court stated in *Kois v. Wisconsin*, 408 U.S. at 231, "[a] reviewing court must, of necessity, look at the context of the material, as well as its content." The inquiry for this court, then, is first, whether *Caligula* has political content, and second, whether in the context of the work taken as a whole, that material is treated in a serious manner.

Caligula clearly contains political, historical, and social themes and subthemes, including the use and abuse of power, dynastic and institutional struggle, the violence and corruption that attends a society bankrupt in moral values, and the fragility of civilization as we know it. In addition, in the context of the film, these themes provide more than a mere vehicle for sexual explicitness. Although the sexual content in *Caligula* is excessive, it is not unrelated to the social and political themes. That *Caligula* could have more eloquently and convincingly conveyed its ideas does not negate its serious political value. We cannot say that the film, taken as a whole, lacks serious political value.

In summary, we conclude: (1) that the film *Caligula*, taken as a whole, does not appeal to the prurient interest in sex; (2) that the film depicts, in a patently offensive way, conduct specifically defined by Ga. Code § 26-2101, and (3) that the film, taken as a whole, lacks serious literary and scientific value, but contains serious artistic and political value.

III. RELIEF

Having found that *Caligula* is not obscene under *Miller v. California*, 413 U.S. 15, and Ga. Code § 26-2101, we will grant the declaratory relief plaintiff requests. Plaintiff also seeks, however, an injunction against defendant arresting, prosecuting, or initiating criminal proceedings against any persons who may distribute or exhibit the film *Caligula* in Fulton County, Georgia. In *Samuels v. Mackell*, 401 U.S. 66, 72 (1971), the Supreme Court stated that "declaratory relief alone has virtually the same practical impact as a formal injunction would." Although plaintiff has shown the threat of prosecution, courts usually assume that law enforcement officers will honor a declaratory judgment. We will deny plaintiff's claim for injunctive relief.

Accordingly, it is hereby DECLARED that the film *Caligula* is not obscene under federal or state law. Plaintiff's claim for injunctive relief is DENIED. Defendant's counterclaim for declaratory relief is DENIED. The Clerk of the Court shall enter FINAL JUDGMENT in favor of plaintiff in this action.

IT IS SO ORDERED.

This, the 15th day of May, 1981.

/s/ RICHARD C. FREEMAN

RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

United States Code, Title 28:

§ 1331. **Federal question**

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§ 1343. **Civil rights and elective franchise**

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

* * *

§ 2201. **Creation of remedy**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and

effect of a final judgment or decree and shall be reviewable as such.

§ 2202. **Further relief**

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

United States Code, Title 42:

§ 1983. **Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Official Code of Georgia Annotated, Title 16:

§ 16-12-80 (formerly Ga. Code Ann. § 26-2101).

Distributing obscene materials

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits, or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has

constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material; provided, however, that the character and reputation of the individual charged with an offense under this law, and, if a commercial dissemination of obscene material is involved, the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates, and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) To the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion;

(2) The material taken as a whole lacks serious literary, artistic, political, or scientific value; and

(3) The material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (A) through (E) below:

(A) Acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(B) Acts of masturbation;

(C) Acts involving excretory functions or lewd exhibition of the genitals;

(D) Acts of bestiality or the fondling of sex organs of animals; or

(E) Sexual acts of flagellation, torture, or other violence indicating a sadomasochistic sexual relationship;

(c) Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this Code section.

(d) Material not otherwise obscene may be obscene under this Code section if the distribution thereof, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(e) It is an affirmative defense under this Code section that dissemination of the material was restricted to:

(1) A person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or

(2) A person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.

(f) A person who commits the offense of distributing obscene material shall be guilty of a misdemeanor of a high and aggravated nature.

Official Code of Georgia Annotated, Title 24:

§ 24-4-3. **Amount of mental conviction required; preponderance of evidence in civil cases**

Moral and reasonable certainty is all that can be expected in legal investigation. In all civil cases a preponderance of evidence is considered sufficient to produce mental conviction. . . .

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 1984, three copies of the foregoing petition for writ of certiorari were mailed, postage prepaid, to:

James L. Paul, Esq.
3900 First Atlanta Tower
Atlanta, Georgia 30383

Norman Roy Grutman, Esq.
505 Park Avenue
New York, New York 10022

I further certify that service is not required on any other persons. Rule 28.

GEORGE M. WEAVER